

COLLATERAL ESTOPPEL AND FOREIGN JUDGMENTS

PAUL D. CARRINGTON*

Ninety years ago, A. C. Freeman expressed his surprise at the frequency and the assurance with which the most irreconcilable conclusions as to the law of judgments had been announced. "Cases have frequently been disposed of," he complained, "in accordance with principles which the Court evidently regarded as indisputable, but which, in fact, were in direct conflict with the law as understood in most other states."¹ This disharmony is no longer surprising inasmuch as we have abandoned our pretense that there is an omnipresent symphony of reason which keeps our decisions in step. What is perhaps surprising, however, is the general absence of dispute on the choice of law problems presented by such divergencies.

The Restatement of Conflict of Laws has dispatched the problem with a half section which declares that "the effect of a valid judgment as a conclusive adjudication between the parties and persons in privity with them of facts which were or might have been put in issue in the proceedings is determined by the law of the state where the judgment was rendered."² A comment to this section further explains that the same law determines who is in privity with the parties to the judgment so long as privity is not imposed upon persons over whom the state has no jurisdiction.³ Judicial declarations which support this rule are abundant, but amazingly few cases can be found which present the issue squarely, and never has a court engaged in an informed effort to resolve it.

The application of the Restatement rule which has been most litigated pertains to the problem of merger through judgment. The New York courts have deferred to the law of the place rendering the judgment to determine its effect as a bar on a later New York action asserting an alleged joint liability against another defendant.⁴ Massachusetts has, however, applied its own law in making the determination.⁵ When the issue was presented for determination by a Cali-

* Associate Professor of Law, College of Law, The Ohio State University.

¹ Freeman, *Judgments* 1 (1st ed. 1873).

² Restatement, *Conflict of Laws* § 450(2) (1934). See also Cheatham, "Res Judicata and the Full Faith and Credit Clause," 44 *Colum. L. Rev.* 330, 346-48 (1944); Ehrenzweig, *Conflict of Laws* 233 (1962); Goodrich, *Conflict of Laws* 633-636 (3d ed. 1949); Leflar, *Conflict of Laws* 133-134 (1959).

³ Comment *d*. The qualification is compelled by the holding in *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912).

⁴ *Suydam v. Barber*, 18 N.Y. 468 (1858); *Crehan v. Megargel*, 199 App. Div. 649, 192 N.Y. Supp. 290 (1922). But cf. *Hinchey v. Sellers*, 7 N.Y.2d 287, 165 N.E.2d 156 (1959).

⁵ *Odom v. Denny*, 82 Mass. 114 (1860) (no conflict stated).

fornia court, it was avoided by a decision that there was not, after all, a real conflict.⁶

Often the suggestion is made that such a reference to the law of the forum rendering the judgment is required by the full faith and credit clause or its implementing legislation.⁷ The statute does provide that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."⁸ Literally, this could mean that judgments shall have the same range of effect in all states as they have where they were rendered. It is, however, far too late to be literal in the use of this statute; many departures from its literal mandate have been countenanced.⁹ Perhaps the most striking of these departures is found in the *McCartin*¹⁰ case, where it was held that a compensation award made in Illinois did not bar further compensation in a Wisconsin proceeding despite its effect in barring a second Illinois award. But there have been other compromises, as must have been expected by the draftsmen of the full faith and credit clause, for complete loyalty to the language would seem to require that process should issue on the judgment of a sister state, and this has until very recently been unthinkable.¹¹

It is not enough, therefore, to cite the general charter; an adequate solution requires some consideration of the purpose of the full faith and credit mandate and the utility of its application. History, such as there is, is of little help;¹² one may speculate that the drafters had

⁶ *Perkins v. Benguet Consol. Mining Co.*, 55 Cal. App. 2d 720, 132 P.2d 70, 94 (1942): "In view of the uncertainty as to which law governs in determining whether a prior judgment bars an action against one not a party thereto, we prefer to leave that question undecided and to place our decision on the ground that if the New York law controls, that law does not bar the present suit against defendant."

⁷ See, e.g., *United States v. Silliman*, 167 F.2d 607, 620, 621 (3d Cir. 1948), *cert. denied*, 335 U.S. 825 (1948).

⁸ Rev. Stat. § 705 (1878), 25 U.S.C. § 1738 (1958).

⁹ See generally Reese & Johnson, "The Scope of Full Faith and Credit to Judgments," 49 Colum. L. Rev. 153 (1949). *But cf.* *Williams v. North Carolina*, 317 U.S. 287, 294 (1942): "Such exceptions have been few and far between . . ."

¹⁰ *Industrial Comm'n v. McCarrin*, 330 U.S. 622 (1947). *Cf.* *Yarborough v. Yarborough*, 290 U.S. 202 (1933).

¹¹ Federal court judgments are registrable in other federal courts throughout the nation. 28 U.S.C. § 1963. The Commissioners on Uniform State Laws have proposed a partial step in this direction for state court judgments with the Uniform Enforcement of Foreign Judgments Act. 9A Uniform Laws Annotated 287 (1957).

¹² Cook, "The Powers of Congress Under the Full Faith and Credit Clause," 28 Yale L.J. 421 (1919); Corwin, "The Full Faith and Credit Clause," 81 U. Pa. L. Rev. 371 (1933); Radin, "The Authenticated Full Faith and Credit Clause: Its History," 39 Ill. L. Rev. 1 (1944); Ross, "'Full Faith and Credit' in a Federal System," 20 Minn. L. Rev. 140 (1936).

it in mind that no state should become a sanctuary for fugitive debtors by forcing the creditors in pursuit to relitigate their claims. The basic concept nevertheless seems fairly clear that it is indecorous for one member of a federal system to undo what another has wrought. This principle seems to have little application to the problem of the choice of law on the issue of the range of effect of a foreign judgment. It would not seem unduly to deprive an Indiana judgment of its dignity to give it the same effect in later Ohio litigation which a like Ohio judgment would have.¹³ This may be especially clear where the foreign law of judgments which the Restatement would apply is peculiarly ill-suited to interstate litigation so that the full faith and credit policy is counterbalanced by weightier considerations. And surely there is no purpose of the full faith and credit principles which has application to prevent an Ohio court from giving broader effect to a foreign judgment than it would have where rendered.

The case often cited as holding that full faith and credit require an application of the prior forum's law of judgments is *Hancock National Bank v. Farnum*.¹⁴ The Court did there hold that Rhode Island could not permit a shareholder defending an action by a corporate creditor to recover on unpaid shares in a Kansas corporation to relitigate the corporation's liability after it had been established in an earlier Kansas suit. It would seem, however, that it is the Kansas law of corporations rather than the Kansas law of judgments to which Rhode Island should give effect. The superior claim of Kansas law in maintaining even treatment of all unpaid shareholders seems obvious. Either all should be privileged to relitigate or none. Indeed, it would not seem to matter whether the first action against the corporation had been in Kansas or elsewhere; still Kansas law should determine the effect of such a judgment on suits against the shareholders. This analysis of the case is reinforced by its comparison with *Ingersoll v. Corum*,¹⁵ which established that Massachusetts is not bound to regard its ancillary administrator as bound by a prior decision adverse to a Montana administrator of the same estate.

The reference to the prior forum's law indicated by the Restatement may also be justified on occasion by the requirements of fairness to the defendant. This can be seen in cases in which plaintiffs seek to

¹³ Cf. *Old Dominion Copper Mining & Smelting Co.*, *supra* note 3, at 133: "The effect of the full faith and credit clause is to put the judgment of a court of one State, when sued upon or pleaded in estoppel in the courts of another state, upon the plane of a domestic judgment in respect of conclusiveness as to facts adjudged." See also *Tucker v. Turner*, 195 Ark. 632, 113 S.W.2d 508, 570 (1938).

¹⁴ 176 U.S. 640 (1900).

¹⁵ 211 U.S. 335 (1908).

enforce invalid foreign judgments. Often, of course, the result in such cases is required by the due process clause because of the constitutional impotence of the court rendering the judgment.¹⁶ But it also seems clearly established that a judgment infected by a failure to comply with the validation requirements imposed by the state which exceed the constitutional requirements is also not enforceable in other jurisdictions with less stringent requirements.¹⁷ What seems to be involved besides due process considerations is another principle of estoppel: a plaintiff who has chosen to draw the defendant into combat according to the rules of the first forum should not be permitted to forsake his choice and invoke the more lenient rules of a second forum retroactively to the first action. This principle was developed and applied in *Public Works v. Columbia College*¹⁸ to estop a plaintiff from his attempted reliance on a Virginia judgment which was not final and hence not yet a bar to further Virginia litigation on the matters in dispute. It can also be illustrated in a more recent case in which the judgment was valid, but of limited effect. In *Gilmer v. Spitalny*,¹⁹ a California court held that the plaintiff could not use his Arizona judgment, rendered in rem against the defendant's community property in Arizona, as a basis for a collateral estoppel in the later California action to impose personal liability, where no such estoppel would be recognized in Arizona. It would seem that the plaintiff's initial choice of the Arizona forum affords a basis for an estoppel offsetting that which he seeks to assert against the defendant. A similar result might be expected where the plaintiff chooses to commence a quasi-in-rem action in a jurisdiction which recognizes the defendant's right to make a limited appearance;²⁰ he should not be permitted to negate the limitation by a later suit for the deficiency in a jurisdiction not recognizing the limited appearance in its own courts.²¹ The limitations of this principle can be seen in the foreign land decree embroglio.²²

¹⁶ *Thompson v. Whitman*, 85 U.S. 457 (1874).

¹⁷ *Forrest v. Fey*, 218 Ill. 165, 75 N.E. 789 (1905); *Norris v. Dunn*, 184 Ark. 511, 43 S.W.2d 77 (1931). *But cf.* *Pemberton v. Hughes*, [1899] 1 Ch. 781.

¹⁸ 84 U.S. 521 (1873). The opinion, at 529, seems to suggest that this result is constitutionally required on inexplicit grounds, but there seems to be no full faith and credit problem and the possible injustice of a contrary decision seems hardly sufficient to challenge the due process requirements.

¹⁹ 84 Cal. App. 2d 39, 189 P.2d 744 (1948). *But cf.* *Harnishfeger Sales Corp. v. Sternberg Dredging Co.*, 189 Miss. 73, 191 So. 94 (1939), *modification refused on rehearing*, 195 So. 322 (1940).

²⁰ See, e.g., *Miller Bros. v. State*, 201 Md. 535, 95 A.2d 286 (1953).

²¹ See, e.g., *Sands v. Lefcourt*, 117 A.2d 365 (Del. 1955). *Cf.* *Combs v. Combs*, 249 Ky. 155, 60 S.W.2d 368 (1933).

²² See generally Currie, "Full Faith and Credit to Foreign Land Decrees," 21 U. Chi. L. Rev. 620 (1954).

Although it has been held that no court has sufficient jurisdiction over foreign land to entitle its decree of transfer to full faith and credit at the situs,²³ there is surely no unfairness in the increasingly popular practice of giving such decrees a binding effect despite their lack of constitutional status.²⁴

In addition to the justifications, the Restatement rule can also claim the obvious virtue of simplicity. Unlike other foreign law which may be urged upon the forum, the judgment comes clearly labelled so that there is no room for dispute as to its source. Thus, uniformity in all fifty states is a realistic expectation. This serves to increase the plaintiff's range of vision when he seeks to foretell the consequences of his litigation, and it has special appeal to those who share the popular dread of forum-shopping; but it, also, is not a universal solvent. This single additional anchor of certainty adds little to what the attentive plaintiff may anticipate without it and surely there is no special need for uniformity, no special hazard of forum-shopping, which can be attributed to the law of judgments. Indeed, where the forum chooses to apply its broader concept of *res judicata* against the plaintiff, it reduces the opportunities for shopping. As many concessions as we are forced to make in our halting pursuit of uniformity, it would seem arbitrary to be absolutist with reference to this single problem.

None of the supporting reasons for the Restatement rule justify its breadth. And, to the contrary, Professors Currie²⁵ and Ehrenzweig²⁶ have been most vocal of late in demonstrating the advantages of a general preference for forum law. The application of foreign law, like the application of the *Erie* doctrine,²⁷ requires the court to try to think with the minds of others—a process so difficult that it seems often to frustrate all thought. This process may be especially dangerous in dealing with a principle like *res judicata* which is procedural in form but which often disguises more substantive considerations not discussed in the opinions which supply the image that the court is called upon to reflect. And, as Professor Currie has observed, a decision that a foreign rule as to the effect of a judgment should override the applic-

²³ *Fall v. Eastin*, 215 U.S. 1 (1909).

²⁴ *McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722 (1961); *Sullivan v. Sullivan*, 168 Neb. 850, 97 S.W.2d 348 (1959); *Lyle Cushion Co. v. McKendrick*, 227 Miss. 894, 87 So. 2d 289 (1956).

²⁵ Currie, "Notes on Methods and Objectives in the Conflict of Laws," 1959 Duke L.J. 171.

²⁶ Ehrenzweig, "The *Lex Fori*—Basic Rule in the Conflict of Laws," 58 Mich. L. Rev. 637 (1960).

²⁷ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). For a discussion of the problem in the state-federal context, see Note, 59 Harv. L. Rev. 1299 (1946).

able local policy to the contrary does make an unseemly claim by the court to a global wisdom not possessed.²⁸ It would seem therefore that the broad rule of the Restatement with all its supporting judicial dicta should be accepted with some caution. There may well be occasions when exceptions, at least, may be justified.

Anticipating such exceptions requires a closer analysis of the types of choices which might arise. The unfolding law of judgments exhibits as its principal feature a modern impatience with piecemeal litigation.²⁹ The trend favoring a broadening of the impact of former adjudication is found in a variety of principles which serve to lay controversies to rest not on the classical grounds that the parties have already been heard, but for the stated reason that they have had an opportunity for a full hearing, or at least that one of them has. We may consider three recent Ohio cases as examples.

In *Rush v. Maple Heights*,³⁰ the court held that the plaintiff was barred from asserting a claim for personal injury because she had had an opportunity to do so earlier in an action in which she had recovered for property damage occurring in the same accident. Such a holding would not have occurred under the old common-law writ system, but code pleading introduced the concept of the cause of action which has been invoked, as it was in the *Rush* case, to bar a plaintiff who would seek to "split" his cause between two actions. The holding serves to complicate the situation where an insurer has subrogated to the property damage claim and is inconsistent with English³¹ and New York³² holdings, among others, to the effect that the property damage and personal injury claims are separate causes of action which may be separately maintained. But it is consistent with the majority view³³ and with the contemporary lust for total litigation.

It is useful for our purpose to ask whether a different result should be expected if the first action to recover property damage had gone to judgment in New York. Would Ohio abandon the rule of the *Rush* case and apply the New York rule permitting the second action, as it has been directed by the Restatement? It may be suggested that there is here no affront to the full faith and credit principle if Ohio adheres to its own rule: the New York proceeding would in no way be depreciated and there is no invitation to forum-shopping. Indeed, that evil

²⁸ Fall v. Eastin, *supra* note 23, at 176-177.

²⁹ Note, 65 Harv. L. Rev. 820 (1952).

³⁰ 167 Ohio St. 221, 147 N.E.2d 599 (1958).

³¹ Brunson v. Humphrey, 14 Q.B.D. 141 (1884).

³² Reilly v. Sicilian Asphalt Paving Co., 170 N.Y. 40, 62 N.E. 772 (1902).

³³ For a collection of cases, see Vasu v. Kohlers, Inc., 145 Ohio St. 321, 327, 61 N.E.2d 707, 712 (1945).

would be reduced by forcing the plaintiff to continue his fragmented litigation in New York, where fragmentation is permissible. This possibility also seems to eliminate any unfairness to the plaintiff of the sort which may sometimes justify the Restatement rule. Surely the defendant cannot be said to have made an election by litigating in New York which should estop him from later asserting the *Rush* rule in Ohio. The hope of uniformity is entitled to some weight if it is desirable to permit the New York plaintiff to assess the consequences of his lawsuit on the basis of knowledge of the New York law of judgments. The likelihood of such analysis and reliance seems slight. And the expectation is disappointed only in the event the defendant withdraws from New York and becomes unavailable for service of process there before commencement of the second suit. In any event, this factor of reliance seems to carry little weight with the Ohio court for the *Rush* case was decided adversely to a plaintiff who had quite reasonably relied on the opinions of the Ohio Supreme Court in believing that such a split would be permitted.³⁴ We are thus left with little reason for the application of the New York rule, other than loyalty to the simple rule of the Restatement. This would seem to be counterbalanced by an equal loyalty to the simple rule of the *Rush* case for the rationale of the decision seems equally applicable whether the former adjudication occurred in New York or Ohio. It is, after all, the Ohio court which the plaintiff has proposed to employ; inasmuch as its docket is to bear the burden and its defendant harassed, the Ohio court would seem to have sufficient interest in the issue to resolve it according to its own lights.

Comparable to the *Rush* case is the decision in *Schimke v. Early*,³⁵ in which the court held the plaintiff in an action against a servant to be bound by an earlier adverse decision in an action against the master for the servant's negligence. Chief Justice Weygandt, speaking for the majority, hurdled the problem of the difference in parties by declaring the servant to be in privity with the master; thus the parties to the two actions are substantially identical and the former adjudication is conclusive of the second action. The generally accepted rule applied to the obverse situation in which the plaintiff first sues the servant, is that he is bound by an adverse judgment and cannot later sue the master for the same claim.³⁶ This result has been deemed necessary to protect the master's right of indemnity and has been re-

³⁴ Cf. *Vasu v. Kohlers, Inc.*, *supra* note 33; *Mansker v. Dealers Transport Co.*, 160 Ohio St. 255, 116 N.E.2d 3 (1953).

³⁵ 173 Ohio St. 521, 184 N.E.2d 209 (1962), noted 24 Ohio St. L.J. 406 (1963).

³⁶ Restatement, Judgments § 99 (1942); *Good Health Dairy Products Corp. v. Emery*, 275 N.Y. 14, 9 N.E.2d 758 (1937).

garded as an exception to the historic requirement of mutuality as a condition of an estoppel of the sort urged by the defendant who did not participate in the successful defense of the first action. The *Schimke* decision was not required by such considerations and was not an application of this narrow exception to the mutuality rule but was a different departure, despite the disguising language of the opinion which finds master and servant in "privity." Judge Taft, in concurring, preferred to rely on a California case which expressed a root-and-branch rejection of the mutuality rule.³⁷ A majority of the Ohio court may ultimately accept this position, but meanwhile it is probably safer to treat the decision as an application of a broader exception to the mutuality rule which permits the use of the forum judgment by a second defendant whose alleged liability is "derivative" of the liability which the plaintiff sought to impose on the first. Professors Moore and Currier have recently claimed³⁸ that this distinction explains most of the case law; as an exception to the general rule of mutuality, it has received a modest indorsement from the Restatement of Judgments.³⁹ But, as Professor Currie has demonstrated, it is not consistent with the classical theory of mutuality.⁴⁰ We may, therefore, in pursuit of our present inquiry, ask whether the Ohio court should have been troubled if the first action against the master had been brought in a jurisdiction whose latest and highest authority yet clings to a vigorous concept of mutuality which would prevent the servant from using the master's successful defense in a later action brought against him in the same jurisdiction. What purpose would be served by deference to such a rule? There is surely no derogation of the foreign proceeding in applying forum law. Nor is there affront to the requirements of fairness, for again, the plaintiff is free to continue his piecemeal litigation in the place where he started it, where he has had one full hearing on the merits of the claim. And the defendant certainly cannot be estopped from asserting the bar by reason of his participation in the earlier litigation, for indeed there was none. We are thus again left with a choice between loyalty to the simple rule of choice of law espoused by the Restatement and loyalty to the forum court's rule and its own best judgment about the propriety of continued

³⁷ 173 Ohio St. 521, 525, 184 N.E.2d 209, 211, citing *Bernhard v. Bank of America Nat'l Sav. & Trust Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942).

³⁸ Moore and Currier, "Mutuality and Conclusiveness of Judgments," 35 Tul. L. Rev. 301 (1961).

³⁹ Restatement, Judgments § 99 (1942).

⁴⁰ "Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrines," 9 Stan. L. Rev. 281 (1957).

litigation. The choice would seem to weigh clearly in favor of forum law.

In both of the examples considered, it was suggested that the forum might apply its more stringent rule. Obviously, the considerations dictated by the full faith and credit clause become more pressing if the laws are reversed, so that the forum would be applying the more restrictive two-action or mutuality rules.⁴¹ Even here, however, it is not clear that full faith and credit compels application of the Restatement rule. Significant, for comparison, is the rule that a foreign judgment based on the staleness of the plaintiff's claim is not "on the merits" and hence not entitled to full faith and credit.⁴² This clearly gives less effect to the judgment than it possesses where rendered and violates the Conflicts Restatement rule; the stated justification is a characterization that the limitation is remedial only and intended only for use in local courts. The same claim can be made, with perhaps more justification, for the law of judgments.

Furthermore, a distinction can be made between effects of the foreign judgment which are direct and those which are collateral.⁴³ To accord the judgment less effect in actions which expose the judgment to direct attack would, indeed, be to undo what has been wrought by a sister state. Where, however, the judgment is collateral to the second action, a decision to disregard it in the disposition of the latter does not disturb the finality of the judgment. So long as the disregard accords with the forum's practice in dealing with like judgments of its own, it does not seem excessively insulting to the sister forum.

To be sure, the characterization argument and the direct-collateral distinction have little intrinsic worth. An escape from the constitutional compulsion is the most these afford. But there may be situations where this freedom to apply a more conservative (less modernistic) rule would be welcome. This is most likely to be true in situations in which the expansive view of *res judicata* seems less just because of the interstate character of the litigation.

It may be helpful here to advert to *Horne v. Woolever*,⁴⁴ in which

⁴¹ The federal courts in Arkansas have recently deferred to the Oklahoma law against splitting, but the opinion reflects meager consideration of the problem. *Gentry v. Jett*, 273 F.2d 388 (8th Cir. 1960).

⁴² *Warner v. Buffalo Drydock Co.*, F.2d 540 (2d Cir. 1933), *cert. denied*, 291 U.S. 678 (1934); *Equity Corp. v. Groves*, 53 A.2d 505 (Del. Ch. 1947); *Harris v. Quine* 4 Q.B. 652 (1869); Restatement, Judgments § 49, comment a (1942). *But cf.* *United States v. Oregon Lumber Co.*, 260 U.S. 290 (1922).

⁴³ The distinction is, of course, basic to the conceptualism of the Restatement of Judgments. A hint of its possible relevance to this issue is made in *Equity Corp. v. Groves*, *supra* note 39.

⁴⁴ 170 Ohio St. 178, 163 N.E.2d 378 (1959).

the Ohio court gave effect to the Federal Rule on compulsory counterclaims.⁴⁵ That Rule requires defendants in federal litigation to assert all claims arising from the transaction which provides the basis of the complaint, upon pain of being denied a later hearing on such claims. Its purpose, like the rules of decision in the *Rush* and *Schimke* cases, is to induce "total litigation," to discourage piecemeal retaliation. It is, indeed, an analogue to the rule of the *Rush* case forbidding plaintiffs to split their causes, for it applies a similar and broader injunction against defendants. It has the unaccustomed result of permitting the counterclaim defendant (the plaintiff) to choose his claimant's forum. Perhaps for this reason, it has not yet been adopted for most state courts, including Ohio's. But the *Horne* case nevertheless held that a defendant in an Ohio federal suit could not later assert in state court a claim which he was required by the Federal Rule to assert in the federal case. The outcome was doubtless influenced by considerations of state-federal comity and by the facts that the earlier federal action had been removed to the federal court by the then defendant, and that the earlier action had been dismissed as a result of a settlement probably intended by the original plaintiff to resolve the whole dispute. The decision nevertheless indicates the willingness of the Ohio court to regard as concluded a dispute on which neither party had actually been heard. It is in this regard another expression of the contemporary development and the rejection of the classical view expressed, with regard to the same problem, in a recent Mississippi holding.⁴⁶

It is most pertinent to our study to question whether the result in *Horne v. Woolever* might differ if the former adjudication had occurred in a state court in Missouri, for instance, which has a compulsory counterclaim rule.⁴⁷ It is suggested that such a difference might be expected if the defendant is an Ohioan who was unwillingly drawn into combat in Missouri. The attractions of the compulsory counterclaim rule are considerably dissipated when it is applied to nonresident defendants whose relation to the forum may be very attenuated in the light of emerging concepts of personal jurisdiction.⁴⁸ Those responsible for the Federal Rule have conceded this in their comment on the recent Rules amendments which would prevent the application of the compulsory counterclaim Rule to defendants in proceedings initiated by attach-

⁴⁵ Fed. R. Civ. P. 13(a).

⁴⁶ *Phoenix Ins. Co. v. Haney*, 235 Miss. 60, 108 So. 2d 277, cert. denied, 360 U.S. 917 (1959). *Contra*, *Jocie Motor Lines, Inc. v. Johnson*, 231 N.C. 367, 57 S.E.2d 388 (1956).

⁴⁷ Mo. Rev. Stat. § 509.420 (1949).

⁴⁸ See Note, 73 Harv. L. Rev. 909 (1960).

ment or garnishment.⁴⁹ There may even be constitutional problems presented by the application of the compulsion to counterclaim against defendants who have been served with constructive process only and whose counterclaims do not relate to the activities in the state which justify the fictional service.⁵⁰ Short of this limitation, however, it would seem proper for courts to recognize the extra harshness of the total litigation concept as applied to interstate situations and to mitigate it by the use of a more conservative forum rule.

The foregoing analysis is surely open to the criticism that it is forced: it deals with problems that have not arisen. Partly, of course, this article serves the champertous purpose of promoting more knowledgeable litigation which will present some of the issues discussed. But it is also thought that the hypotheticality of the treatment serves to illustrate the unreality of the conventional conflicts approach to the problem which is expressed in the Restatement. As Justice Traynor has recently observed,⁵¹ the choice of law issue is often a bogus one; so it has been here. Although these more difficult situations have not arisen, the Restatement and many courts have offered to propose solutions which can only encumber the work of decision when it becomes necessary. Meanwhile, the starting point proposed by our most active contemporary commentators⁵² seems valid in its present application: our courts should determine the collateral consequences of foreign judgments according to their own best wisdom until some compelling reason for departing from that wisdom is demonstrated to apply to the case at hand.

⁴⁹ Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts (1961).

⁵⁰ Cf. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 319 (1945).

⁵¹ Traynor, "Is This Conflict Really Necessary?," 37 *Texas L. Rev.* 657 (1959).

⁵² See Currie, *supra* note 25; Ehrenzweig, *op. cit. supra* note 2.